Neutral Citation Number: [2009] EWHC 912 (QB)

Case No: HQ07X03635

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2009

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

CHRISTOPHER JOHN QUINTON	**Claimant**
- and -	
(1) ROBIN HEYS PEIRCE **(2) JAMES DAVID COOPER**	**Defendants**

- -
- -

Mark Warby QC and **William Bennett** (instructed by **Manches LLP**) for the **Claimant**
Anthony Speaight QC (instructed by **Goodman Derrick LLP**) for the **Defendants**

Hearing dates: 1 - 6 April 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

The parties to the dispute

1. This is a case which ventures into largely uncharted territory. It also presents difficulties on the facts. It is a dispute between two district council candidates from Woodcote in Oxfordshire. The Claimant is Mr Christopher Quinton, the Conservative candidate in the elections of May 2007, who was defeated by the Liberal Democrat candidate, Mr Robin Peirce. Four years earlier, in the elections of May 2003, the boot had been on the other foot. Mr Peirce had been ousted by Mr Quinton.

2. Mr Peirce is the First Defendant and is sued in respect of an election leaflet said to contain a number of untrue factual statements about Mr Quinton. Both men have clearly rendered sterling service over the years to their local community in various ways, but it is unhappily clear that no love is lost between them. The Second Defendant is Mr Peirce's election agent, Mr David Cooper.

The two causes of action relied upon

3. The claim is not brought in libel: what is alleged is that Mr Peirce published the allegations maliciously. The claim is not confined, however, to the tort of injurious falsehood. Mr Warby QC, on Mr Quinton's behalf, seeks to rely in the alternative upon what are said to be infringements of the principles set out in the schedule to the Data Protection Act 1998. I presume that this has been brought into the case against the possibility that the Claimant fails to establish one or more of the essential ingredients for the common law cause of action, such as malice or a tendency to cause financial loss. The 1998 statute also offers in ss.13 and 14 remedies not available at common law. Thus, I am required to consider a number of its provisions, which Mr Warby says are notoriously badly drafted. That is not for me to say. I confine myself to observing that it clearly reflects the European Directive (95/46 EC), to achieve compliance with which it was introduced. I intend to take a cautious approach and not to venture into questions of interpretation any further than I strictly need for resolving the pleaded issues on the facts which have emerged in evidence.

4. Mr Warby's submissions are very wide ranging. It seems that he contends for a parallel code to regulate the publication of information, which would exist alongside the conventional common law remedies, such as defamation and injurious falsehood, whenever allegations are made about a "data subject" by means of a computer. That is subject to exemptions for journalism which, the Defendants concede through Mr Speaight QC, have no application to this election leaflet.

5. Mr Warby complains that in this case the leaflet infringes two of the principles in the statute, namely the requirements for fairness and accuracy. I understand the principal criticism to be that Mr Peirce was economical with the truth and, in so far as his allegations were true, they did not represent the whole truth. Mr Speaight argues that if candidates in elections were not allowed to be partial, biased and economical with the truth, litigation lawyers would have a field day. It would undermine our democracy if politicians, whether at a national or a local level, were required to be impartial and balanced in their coverage of an opponent's conduct or policies. While Mr Warby recognises that much leeway has to be permitted, he suggests that there is a requirement not to misrepresent the facts. In this context, of course, there is much

scope for debate as to what is misrepresentation and what is opinion or merely rhetorical licence.

The statements contained in the offending leaflet

6. For the moment, I must turn to the material of which complaint is made and identify the respects in which it is said to be inaccurate. There seem to be three allegations in the leaflet about Mr Quinton in particular, which it is fair to say even Mr Peirce's own agent, Mr Cooper, described as "negative whingeing" prior to publication. That warning, however, seems to have gone unheeded by Mr Peirce. All these criticisms centre upon a crucial issue for Woodcote residents, namely planning policy and its implications for potential housing development in and around their village.

7. The first passage in the leaflet is as follows:

> " … MORE HOUSES IN BEECH LANE?
>
> At a crucial planning meeting in Crowmarsh, attended by many local residents and Parish Councillors, strong representations were made to persuade the committee to refuse planning permission for the housing development off Beech Lane. Robin Peirce and all who made the effort to go to Crowmarsh were appalled that Chris Quinton failed to attend the meeting, failing to speak and urge refusal of the unneighbourly planning application.
>
> OUR VILLAGE DESERVES BETTER REPRESENTATION AT CROWMARSH."

8. This refers back to a meeting held a year before, at 6 pm on 5 April 2006. While it is true that Mr Quinton did not arrive at the meeting until the Beech Lane item on the agenda had been dealt with, he contends that it is a misrepresentation to give the impression that he did not "make the effort". He had rung the Chair of the meeting, Mrs Pearl Slatter who gave evidence before me, in order to establish in advance when the item was likely to be reached. He then decided that he would be able to attend another meeting (in Oxford) and still arrive in Crowmarsh, about ten minutes after the meeting had begun, in time to speak against the proposal. As things turned out, much to the surprise of Mrs Slatter, the first item was cancelled at short notice and Beech Lane was dealt with somewhat earlier than anticipated and before Mr Quinton's arrival. Mr Peirce had seen him arrive late, in a somewhat flustered state, and therefore must have realised that he had intended to speak on the subject.

9. Mr Warby argues that in these circumstances the description in the election address was a deliberate misrepresentation and therefore malicious. He did, however, at the conclusion of the evidence, recognise that the witnesses who had been present, including Mrs Slatter, gave an account which strongly suggested that Mr Quinton did not arrive until at least 6.30 or possibly 6.45 pm. Moreover, had he arrived at 6.10 pm, there would have been plenty of time for him to speak on the Beech Lane issue. From the number of speeches, and the five minute slots allocated to them, it was possible to work out that discussion on the topic went on until about 6.45 or 6.50 pm.

It would thus seem to be clear that the cancellation of the first item on the agenda did not, by itself, account for Mr Quinton's failure to arrive on time.

10. The second item to be addressed in the leaflet concerned another planning application:

> " … HOUSING AT THE VILLAGE CROSSROADS
>
> At a large public meeting in Woodcote residents overwhelmingly objected to the application. Following a refusal by SODC [South Oxfordshire District Council] of planning permission for houses opposite the village hall crossroads, a public inquiry was held in Goring. While Robin Peirce, supported by many residents and other Parish Councillors, spoke at the inquiry to urge refusal of the application, Chris Quinton failed to take any part in the inquiry.
>
> OUR VILLAGE DESERVES BETTER REPRESENTATION FROM WOODCOTE'S DISTRICT COUNCILLOR."

11. On this occasion, Mr Quinton did attend the meeting but, according to his evidence, he did not make any contribution because he realised that the appeal would be dismissed and saw no need to do so. It is accepted, therefore, that he took no part in the inquiry, apart from attending it, but he objects to the criticism that he "failed" to do more. The witnesses who had been present on this occasion queried how Mr Quinton could have been so confident that the appeal would be dismissed. The inspector gave no such indication and indeed it would not have been appropriate for him to do so.

12. When the matter had been discussed earlier at a public meeting convened by the Parish Council on 16 May 2006, Mr Quinton took no part in the proceedings because he regarded it as contrary to good practice to do so, given that he was a substitute member of the planning committee and might have been called upon to participate in the decision. Had he spoken at that meeting, and expressed his opinions, he would have precluded himself from playing such a role. By the time of the appeal, however, he was free from this inhibition.

13. The third item is more general in nature and purports to state Mr Quinton's attitude to significant housing developments in the village:

> "NEW LAND FOR DEVELOPMENT?
>
> Local Conservative Councillors are actively encouraging significant housing developments on the edge of Woodcote. On the front page of the Woodcote Correspondent, May 2006, Chris Quinton wrote 'South Oxfordshire needs to provide more houses … to accommodate new residents attracted to the area by the buoyant economy and good living standards … suggested sites for development from landowners should be submitted to … the Council Offices … ' Woodcote now has more proposed housing sites than any other village in South Oxfordshire. ROBIN PEIRCE REMAINS TOTALLY

> COMMITTED TO PROTECTING WOODCOTE FROM UNWANTED LARGE DEVELOPMENTS AND LOSS OF RURAL VILLAGE IDENTITY."

14. Mr Quinton takes the view that this grossly misrepresents his position, since as a long term resident in Woodcote since 1986 he is totally opposed to significant housing developments which would endanger the rural environment.

15. What Mr Peirce based these comments upon, and selectively quoted from, was an item appearing in May 2006 on the front page of the Woodcote Correspondent, which was edited by Mr Quinton. In order to understand the criticism Mr Quinton makes of Mr Peirce's selective quotation, it is necessary to set out the whole of that article. It had been intended to be a summary of a press release put out on 7 April 2006 by the South Oxfordshire District Council, which set out the planning requirements imposed upon it from a national and regional level. Mr Quinton was not necessarily intending to express approval of development in the village but, he says, merely seeking to inform his constituents of the policy which the District Council was required to implement and of the start of its consultation process. He conceived it as part of his duty to do so, rather than suppressing it or keeping them in the dark.

16. His summary was in these terms:

> "NEW LAND FOR DEVELOPMENT?
>
> South Oxfordshire District Council is seeking views on where new housing should be sited, what types should be built and, particularly, what additional facilities and infrastructure will be needed, if additional houses are built. At the same time, land-owners and developers have been invited to submit suggestions for suitable sites for new housing development.
>
> South Oxfordshire needs to provide more houses, primarily to meet local demand, but also to accommodate new residents attracted to the area, by the buoyant economy and good living standards. Availability and affordability of housing is a key issue in the district.
>
> In its Oxfordshire Structure Plan 2016, the County Council requires that sites are found for about 1,300 additional houses in the district, all to be built by 2016. Their plan indicates that new development should take place in and around the towns and larger villages in this district.
>
> The South Oxfordshire Local Plan defines the larger villages in the district as, Berinsfield, Benson, Chalgrove, Chinnor, Cholsey, Garsington, Goring, Horspath, Sonning Common, Watlington, Wheatley and Woodcote.
>
> The Council will consider all sites submitted on their individual merits,

> Initially, it is looking for previously developed land, but must also consider green-field sites, if there is insufficient land which can be re-used. Existing constraints, such as green belt, or Area of Outstanding Natural Beauty (AONB) designations will be important factors during the site assessment stage.
>
> The Council is starting work on a plan to identify where the new houses should be. The plan will allocate land to meet the requirements of the County's structure plan and also identify broad locations for development for a further period to 2026. Sufficient land, in and around Didcot, has been allocated for the period to 2016. Work to identify further areas around Didcot for the period to 2026 will be undertaken as a separate project.
>
> A programme for the preparation of the Housing Site Allocations document, together with background information, is available from the Council.
>
> Comments on potential locations for new housing, the breakdown of house types, sizes and tenures, the additional facilities and infrastructure required as well as site plans, showing suggested sites for development from landowners should be submitted to the Planning Policy Team at the Council Offices, Benson Lane, Crowmarsh, Wallingford OX10 8JN by 6th June 2006."

17. Mr Peirce told the court that Mr Quinton had made no public statement as to his own position on significant housing development and he, therefore, had no reason to believe that his (admittedly selective) quotations from the Correspondent article in any way gave a false impression as to his stance. He thought the article spoke for itself and, to him at least, it seemed to be endorsing the SODC's expansionist policy (while accepting that it had been imposed from "above"). It is fair to say that Mr Quinton attaches significance to the question mark he had inserted after the heading. This, he suggests, should have made it clear to readers that he was not endorsing further development.

18. It is also clear that the Parish Council, which had seen an advance copy of the Correspondent on or before 19 April 2006, reacted with alarm. So much so that Mrs Frances Cork (another witness) was tasked with drafting a "flyer" from the Parish Council, to be delivered to households along with the Correspondent and expressing its "dismay". There seems no doubt that parish councillors, rightly or wrongly, took the Correspondent to be giving encouragement to significant development.

19. It was explained by Mr John Cotton, a district councillor called on Mr Quinton's behalf, that the press release issued by the SODC was a means of engaging in the consultation process required by national government. It was inviting submissions for development proposals, but was obviously not intended to give an indication that any individual proposal would be accepted. That is because any such proposal would have to be processed in the ordinary way in accordance with planning procedure. Mr Cotton added that the main objective, on the part of the SODC, was to allay concerns about development and to reassure people in the locality that it would seek to

safeguard green environments. In any event, established planning policy was against significant development in rural villages and in favour of protecting rural amenities as far as possible. That was why development had hitherto been concentrated in Didcot.

20. Mr Warby draws attention to the fact that Mr Peirce's selective quotation from the Correspondent article significantly omits the words "… primarily to meet local demand". It thus gives the impression that Mr Quinton was positively encouraging building in the locality specifically "to accommodate new residents". Mr Speaight observed that this was one of two purposes, expressly defined in the SODC press release, and that there was no reason why Mr Peirce should not be allowed to draw particular attention to one of them.

21. It also omitted the words "the Council will consider all sites submitted on their individual merits", which tended to foster the impression that the new policy was to encourage some kind of "fast track" process.

22. It is also said that the preliminary nature of the exercise, which was likely to take several years, was being concealed – thus giving the impression that it had already been decided as a matter of policy that there should be significant building development in Woodcote and causing unnecessary alarm to local residents. No reference was made, for example, to the sentence in the Correspondent to the effect that "the Council is starting work on a plan to identify where the new houses should be". Moreover, nothing was said about the importance to be attached to an Area Outstanding Natural Beauty designation (a matter of particular significance in Woodcote).

The Claimant's case on injurious falsehood

23. The Claimant has set out in the particulars of claim a number of natural and ordinary meanings (as is customary in defamation cases):

> "6.1 In stark contrast to the First Defendant, the Claimant was not committed to protecting Woodcote from unwanted large developments or loss of rural village identity. On the contrary, the Claimant was a supporter of significant or large housing developments on the edge of Woodcote for the purpose of accommodating new residents attracted to the area (as opposed to local people, young families and key workers, for whom affordable homes were desperately needed) although they were unwanted by locals and would destroy rural village identity.
>
> 6.2 The Claimant was actively encouraging significant housing development on the edge of Woodcote for the benefit of new residents, having gone so far as to write an article on the front page of the Woodcote Correspondent setting out his views to that effect and urging landowners to write to the Council suggesting sites for such development.

> 6.3 The Claimant's support for development of this kind explained the appalling neglect of his constituents' wishes and interests and his own responsibilities which the Claimant had shown by failing even to make the effort to attend a crucial planning meeting in Crowmarsh, concerning a planning application for a large and unneighbourly housing development in Beech Lane, which his constituents strongly opposed.
>
> 6.4 The Claimant's support for such development also accounted for the further neglect and/or disregard of his constituents' wishes and interests that he had shown by his complete non-participation in an important public inquiry concerning another large housing proposal, this time for houses opposite the Woodcote village hall crossroads, to which locals were overwhelmingly opposed."

These are what Mr Speaight describes, not unfairly, as "extended meanings" (i.e. going beyond the literal sense of the leaflet).

24. In the context of injurious falsehood, in which malice is an essential ingredient, it is generally wise not to be too creative in defining the natural and ordinary meanings relied upon by the claimant, because one has to remember that it is necessary to prove that the relevant defendant or defendants had such meanings in mind and knew at the time of publication that they were false (or was reckless in that regard).

25. This pitfall is highlighted in the present case, since the Defendants advance lesser meanings in their pleading and, notwithstanding the burden of proof in this form of litigation, set out to support the accuracy of *their* meanings and, in some instances, also advance what appears to be a defence analogous to fair comment (normally, of course, confined to the tort of defamation). The object of this is, I take it, to demonstrate that a significant part of Mr Peirce's leaflet consists of comment or inference (as opposed to allegations of verifiable fact), which in itself would not be susceptible to a claim of injurious falsehood.

26. Mr Warby argues that the Defendants' approach is impermissible, since it is seeking to defend meanings of which his client does not complain and is attempting (as frequently happens in libel actions) to re-write the words complained of in order to defend them more effectively. Yet this cuts both ways since, as I have suggested above, the particulars of claim might be thought to contain a certain amount of "re-writing".

27. He argues that the court must focus upon what he contends are the natural and ordinary meanings that would be conveyed to the ordinary reasonable reader of the election address. This approach in general terms would appear to be supported by authority: see e.g. *Vodafone Group v Orange Personal Communications* [1997] EMLR 84; *British Airways Plc v Ryanair Ltd* [2001] FSR 32; and *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 781 (QB) at [30].

28. Questions have been raised as to whether the somewhat artificial "single meaning" rule, recognised as applicable in libel cases, should be transferred into the context of injurious falsehood. Jacob J (as he then was) in *Vodafone* left the point open, as it was unnecessary for him to decide it, but suggested that the tort of injurious falsehood was in some ways more closely analogous to that of passing off, where such a rule would not apply. He commented that one policy factor which might go to justify the "single meaning" rule in a libel context was the availability of jury trial. I understand him to be suggesting that it might be explicable on the basis that a jury should fix upon a single meaning, if possible, rather than judging liability and compensation issues by reference to differing views among jury members as to the interpretation of the words complained of. That may be so, but it is accepted that the single meaning rule applies also in libel cases to be determined by judge alone.

29. At all events, it would seem logical to adopt the same rule in the present context. Unless the court makes a finding on the meaning(s), it would not be possible to decide whether the words are true or false. It may be said, however, that the facts of the instant case do rather illustrate the artificiality of the rule. Also, one has to be careful in attributing the single meaning(s) not to become so absorbed in the creative pleading process as to slew the overall message away too far from the impression the words would make on the reasonable elector casting a casual eye over what has come through his letter box. Such a person cannot be assumed to be heavily biased in favour of one party or candidate rather than another.

30. Nevertheless, it seems inherent in Mr Warby's case that his pleaded meanings are factual in character, demonstrably false and, what is more, that Mr Peirce at the time of publication knew that they were false (or was genuinely indifferent as to truth or falsity).

The Defendants' case on injurious falsehood

31. Mr Speaight's primary case is that there is no place in electioneering for the tort of injurious falsehood. In other words, there should be some form of blanket immunity for statements made in the course of election campaigning. I have little difficulty in rejecting this submission, since there is no authority to support it. There is no reason why a different principle should apply to this cause of action from that recognised in relation to defamation. For example, it is expressly provided in s.10 of the Defamation Act 1952 that there is no specific privilege arising from the fact that a statement has been made in that context: see also *Culnane v Morris* [2006] 1 WLR 2880. Furthermore, the House of Lords rejected any blanket form of privilege for statements falling into the category of "political speech" in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

32. It is also submitted on the Defendants' behalf that it is important to have in mind the context of this election leaflet. It is by its very nature "utterly partisan". From this proposition Mr Speaight goes on to contend that "no reader is going to derive an extended meaning, going beyond the strict statements of fact in the leaflet, because the reader knows … of the selectivity of content which is the hallmark of such leaflets". Context, of course, is important when determining what meaning or meanings the reasonable reader will derive from any published words. Mr Warby submits, on the other hand, that an elector's general scepticism about election pamphlets may well affect the weight he gives to allegations contained within them

but, where they have an unambiguous meaning, it would not be appropriate for that reason to change the meaning as such. As a matter of analysis, that is clearly correct.

33. It is important to recognise that the fact that a man's actions may have encouraged certain behaviour on the part of others does not necessarily mean that he wished this consequence to happen. People's actions, whether they be politicians or not, can often lead to unintended consequences: see e.g. *Gillick v Brook Advisory Centres* [2002] EWHC 829 (QB).

34. The Defendants' case is that the Beech Lane allegation was not false. They submit that the conversation with Mrs Slatter prior to the meeting had, in the event, very little to do with Mr Quinton's late arrival. He gave priority to the Oxford meeting, in which he participated as a member of the Chamber of Commerce, over attending the meeting in Woodcote. He therefore cannot complain if a political opponent criticises him in that regard.

35. Of course it is accepted that there are explanations that can be given and it has to be recognised that Mr Quinton intended to come to the Woodcote meeting. There is no reason, however, says Mr Speaight, why the law should afford a remedy simply because Mr Peirce chose to put the matter in the worst light with a view to political advantage.

36. As to the Goring meeting, Mr Peirce chose to put an adverse interpretation on what are essentially uncontroversial facts. Mr Quinton did not put his name down to speak or present any submissions in writing. It was accepted by Mr Quinton himself that there were no preliminary indications, or straws in the wind, to be derived from anything the inspector said in the course of the meeting. That was also confirmed by another witness, Ms Karen Woolley. Thus, argues Mr Speaight, it is fair and reasonable "to describe a silent observer as a non-participant in an appeal".

37. Turning to the more general criticism made of Conservative councillors (that is to say, "actively encouraging"), Mr Peirce's case is that he was not making assertions or comments about what Mr Quinton actually wanted, so far as development in Woodcote was concerned. He had no information about his views that would enable him to do so. What he was commenting upon was the likely effect of the prominence he gave through the article in the Correspondent, in May 2006, to the SODC consultation process. Mr Peirce, like the parish councillors, took the view that this would have adverse consequences – whatever Mr Quinton's personal views might be.

38. Mr Speaight also deployed a "proof of the pudding" argument. Between May 2006 and April 2007, it was possible to form a judgment as to the consequences of the Correspondent article. This was apparently one of the reasons why Mr Peirce saw no reason to correct what he had said, even with the benefit of hindsight.

39. According to the evidence, about 17 sites had been put forward for proposed developments in Woodcote – more than any other village in the area. There is some reason to suppose that three of these sites were proposed as a result of the owner's having read the article in the Correspondent (a Mr Booker). It was also quite possible, as Mr Quinton conceded, that three other sites were also put forward for the same reason. One proposal relating to a Woodcote site came from a resident of Crays Pond and another related to the Woodcote Garden Centre. The third proposal,

emanating from someone called Angie Saunders, was presented in a document that was virtually identical to that of Mr Booker. That suggests perhaps that she too had been prompted by the Correspondent article.

40. Mr Speaight submits that it was "extraordinary" for a councillor in Mr Quinton's position to give prominence to the consultation process, since he represented a ward where hostility to development was so strong – the more so since he gave no reassurance to the voters to the effect that he would fight their corner. Even when the Parish Council expressed its "dismay", he apparently gave no reassurance at that stage that he would be taking steps to prevent or limit development in Woodcote. All he appears to have said, in another edition of the Correspondent, was that he was neutral on the topic; what is more, that this should have been apparent from the question mark he inserted in the heading of the Correspondent article. Moreover, at a later stage, when there was a meeting on the subject in the village, in October 2006, he expressed no personal views but reassured residents that it was part of a consultation exercise.

41. It is said by Mr Speaight that Mr Quinton's neutrality or silence on the subject of development was a perfectly legitimate matter for a political opponent to criticise or make comment upon. Even if his position was entirely defensible, in that he saw it as his duty to notify his electors about the SODC consultation process, this did not prevent him supporting or campaigning for local resistance to development.

42. The Defendants' case is that the issue of falsity should be judged, in accordance with the normal practice in defamation cases, by reference to the test of what is or is not *substantially* accurate. Mr Peirce, as a hard-hitting political campaigner, was entitled to be selective in the facts he chose to present to the electorate, provided there was no substantial inaccuracy in what he said. The test in this context should not be the same as that for a defendant seeking to sustain a defence of privilege for a court or parliamentary report; that is to say, whether it was a fair and accurate summary. In order to attract a defence of qualified privilege, such a report does indeed have to be fair and accurate. A political pamphlet or election leaflet, by contrast, can be partisan and selective.

43. Mr Speaight made extensive submissions on the issue of malice. He made reference, in particular, to the decision of the High Court of Australia in *Roberts v Bass* [2002] HCA 57, 212 CLR 1. At [11] Gleeson CJ made the observation, in the context of an election campaign, that the motive of injuring a candidate by diminishing his or her prospects would not of itself constitute malice. A little later, at [15], he commented that the mere absence of a positive belief in the truth of what is said does not constitute malice either.

44. In the joint opinion of Gaudron, McHugh and Gummow JJ, a gloss was put on the words of Lord Diplock in *Horrocks v Lowe* [1975] AC 135, to the effect that " … he made it clear that the plaintiff had to prove that the defendant was aware of the falsity of the publication or so wilfully blind to it that knowledge of its falsity was imputed to him".

45. It is necessary also to have in mind the principle, to which reference was made by the Court of Appeal in *Loveless v Earl* [1999] EMLR 530, to the effect that, if a defendant believes that the words he is publishing bear one meaning, in which he has

an honest belief, it would not necessarily be sufficient to establish malice on his part if the court were to find that his words bore a different meaning, in the truth of which he had no belief.

46. I am here invited by Mr Speaight to conclude that Mr Peirce made no false statements of fact – still less any statements which he knew at the material time to be false. *A fortiori* so far as Mr Cooper is concerned.

47. There is another issue which arises in the context of injurious falsehood. It is provided in s.3(1) of the Defamation Act 1952 that:

> "In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage –
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form, or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

Were it not for this statutory provision, it would have been necessary to prove actual financial loss.

48. In this case, Mr Warby prays in aid as the prospective financial loss the allowance which would have been available to Mr Quinton as a district councillor had he been re-elected. This would have been £2,855.97 per annum. Reference is also made to the potential loss of an additional allowance of £3,897.79 per annum which would have been payable if Mr Quinton had become a committee chairman.

49. This is said on the Defendants' behalf to be highly artificial, since councillors do not seek election for the financial rewards and, indeed, some are actually left out of pocket. It would thus be wrong to take into account the sums which were, or might have become, available to Mr Quinton without also setting off the expenses which he would have incurred in carrying out his duties. I was shown a passage in a report of the Independent Remuneration Panel to the SODC in November 2007:

> "5.2 The basic allowance is not to be viewed as a wage or payment for carrying out the duties of a councillor. Primarily it is intended to be a sum sufficient to ensure that councillors are not out of pocket in the performance of their civic duties. It is also a token recognition of the time sacrifice involved."

50. Mr Speaight submits, with reference to the statutory wording, that the court should adopt the approach of Lewison J in *IBM v Web-Sphere* [2004] FSR 39 at [74]. The Claimant needs to show that the economic loss in question was likely to or probably

would result from the publication of the words, rather than being merely a possibility. Whether or not the words were "calculated" to cause the Claimant pecuniary loss is a matter to be judged, not by reference to what might subsequently have happened, but rather as at the time of publication (i.e. during the period when the leaflet was being distributed prior to the election itself).

The Claimant's case on the Data Protection Act

51. Mr Warby submits that the information of which his client complains in the election address was "personal data" within the meaning of s.1(1) of the Data Protection Act.

52. "Data" in this context means information which is being processed or is recorded with the intention that it should be processed by computerised means. "Personal data" relates to an identifiable living individual. This is to be seen in the context of Article 2a of the Directive, which refers to "personal data" as meaning "any information relating to an identified or identifiable individual". I was also invited to take into account the decision of the European Court of Justice in *Lindqvist* [2004] 1 QB 1014, where the words were given a broad interpretation.

53. Also drawn to my attention was the discussion contained in Jay, *Data Protection*, at paragraphs 3-29 to 3-33. I shall return to this shortly.

54. Mr Warby also argues that there can be little doubt that the information in the leaflet was "processed" (as he submits, by both Defendants). The generally accepted view would appear to be that "processing" covers any imaginable treatment of information or data: see e.g. Tugendhat and Christie, eds, *The Law of Privacy and the Media* (OUP, 2002), at para 5.25. The same view is expressed in the *Legal Guidance* published by the Information Commissioner, at para 2.3, where it is observed that " … it is difficult to envisage any action involving data which does not amount to processing within this definition". I naturally recognise that this does not represent binding, or even persuasive, legal authority. Nonetheless, the court is grateful for any assistance in the interpretation and application of this important and wide-ranging legislation.

55. The next question is whether either of the Defendants was a "data controller" within the meaning of the Act. Such a person controls processing and in this case it is said that the First Defendant plainly falls within the definition, since he composed and organised the offending passages in the text and disclosed it to the printer. Moreover, the Second Defendant's status as Mr Peirce's election agent gives him a responsibility for the contents of the election leaflet.

56. Mr Warby drew my attention to observations in the Court of Appeal in *Campbell v MGN Ltd* [2003] QB 633, at [106], where it was said that:

> " … where the data controller is responsible for the publication of hard copies that reproduce data that has previously been processed by means of equipment operating automatically, the publication forms part of the processing and falls within the scope of the Act."

This was with a view to making clear that the Act does not cease to have application merely by reason of the processing resulting, as here, in hard copies.

57. There was a suggestion, albeit not given much prominence by Mr Speaight in his closing remarks, to the effect that the national Liberal Democrat party was the controller of the data. There is, however, no evidence before the court that anyone at the headquarters knew what was going on: this was very much a local matter and the words were put together by Mr Peirce. Although Mr Cooper tried to alter or tone down the content, he did not succeed in doing so.

58. Against this background, it is argued that both Defendants were under the statutory duty to ensure accuracy: see s.4(4), s.70(2) and the fourth principle from the schedule.

The Defendants' case on the Data Protection Act

59. Mr Speaight's primary submission was that there is no room for data protection remedies in the context of an election campaign because of the need for free and uninhibited discussion before the electorate. I reject this argument for largely similar reasons to those I mentioned in the context of injurious falsehood. There is no exemption in the statute; nor is there any judicial authority to support the proposition.

60. It was also suggested that the contents of the leaflet did not fall within the definition of "personal data". Reference was made to the decision of the Court of Appeal in *Durant v FSA* [2003] EWCA Civ 1746 at [27]–[29]. This was relied upon to support the argument that the concept of "personal data" involves a degree of intrusion into personal privacy. Mr Warby responds that this construction is too restrictive and that it is inconsistent with Article 2a of the European Directive, as interpreted in *Lindqvist*. The article is expressed in these terms:

> "Personal data shall mean any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."

61. Recital 26 to the Directive is also relevant:

> "Whereas the principles of protection must apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify such person; … whereas the principles of protection shall not apply to data rendered anonymous … ."

62. The Court of Appeal decision in *Durant* is thought to have rendered the position within this jurisdiction somewhat uncertain. One possible view is that, in order to qualify as "personal data", information needs to be more proximate to the individual than had previously been thought. As has been pointed out in Jay, *Data Protection*,

this creates significant problems for data controllers as to where to draw the line, especially in the context of subject access requests. Accordingly, some guidance was issued by the Information Commissioner on how to apply the Court of Appeal decision in *Durant*. It is to be noted, however, that this has been criticised by the European Commission on the basis that the more narrow interpretation is incompatible with the Directive itself.

63. The uncertainty can be readily understood when considering paragraph [28] in the judgment of Auld LJ:

> "It follows from what I have said that not all information retrieved from a computer against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity … "

64. It is suggested by Jay that the "tests" proposed in *Durant* are "difficult to apply in practice".

65. Despite this uncertainty, Mr Warby submits on Mr Quinton's behalf that the information in the leaflet would qualify as personal data even if one applies the somewhat narrower approach contemplated by Auld LJ. Mr Speaight, on the other hand, argues that the information in question was concerned with Mr Quinton's performance as an elected councillor and his suitability for re-election. He suggests that this falls outside the notion of "personal data".

66. Furthermore, Mr Speaight draws attention to the curiosity that "sensitive personal data" include "political opinions": see s.2 of the Act. He suggests that the logical conclusion of Mr Warby's argument is that even a colour photograph on a website of Mr Quinton at a public meeting, wearing a blue rosette, would constitute "sensitive personal data".

67. If driven to it, however, Mr Speaight was prepared to argue that the information in the leaflet did not contain data on Mr Quinton's "political opinions" since:

> "(a) Information on his attendance, or non-attendance, at a meeting is not a statement as to his political opinions.
>
> (b) Information on whether he participated or not at an inquiry he attended is not a statement as to his political opinions.
>
> (c) Information on whether he has encouraged development is … a statement as to the effect of his actions, not his personal preference as to what should happen. It may be the inadvertent consequence of ham-fisted actions. But even the explicit statement, if it had been made, 'Quinton favours planning consent for a new housing estate at Woodcote' would not be a statement of his political opinions. The phrase 'political opinion' in the context of s.4, and reading it *eiusdem generis* with the other items in the list, connotes something in the nature of ideological or philosophical belief, not merely a policy position on one item of local administration."

68. The fact that the parties find themselves having to argue for fine and arbitrary distinctions of this kind illustrates the confusion and uncertainty attending the application of these legislative provisions.

69. Mr Speaight also relies, if it is necessary, upon the exemption contained in condition 5 in Schedule 3 to the Act:

> "The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject."

It is said that all the information contained in the leaflet related to Mr Quinton's public record. I consider that to be a formidable argument.

70. He further places reliance upon condition 1, which excludes circumstances of "explicit consent". It might be said that the publication on the front page of the Correspondent, and his attendance or non-attendance at public meetings, would connote Mr Quinton's consent to this information being processed, as well as showing that the information had been made public by steps deliberately taken on his part.

71. As I have indicated, argument was also directed to whether or not either or both of the Defendants could be characterised as "data controllers"; that is to say, whether either of them was a person who "determines the purposes for which and the manner in which any personal data are, or are to be, processed". Mr Speaight argues that the data controller in respect of election campaign publications would be the Liberal Democrat Party, which had declared through its "notification" (i.e. registration) that one of its purposes was "canvassing political support among the electorate". Against

this background, it is submitted that only the Liberal Democrat Party could be liable for damages under s.13 of the Data Protection Act and, furthermore, that this would mean that Mr Peirce would have been at most a "data processor" (i.e. carrying out a relatively lowly function).

72. Mr Cooper's role was, it is said, limited to receiving the draft leaflet as a pdf attachment, opening it and looking at it. He declined to interfere with its distribution and, although he tried to tone it down somewhat, he did not succeed in doing so. He thus expressed no approval of the contents of the leaflet prior to the printing of the hard copies. I am invited to conclude that he, therefore, cannot be properly categorised even as a "data processor".

73. There is a further argument advanced by Mr Speaight, relating to the claim for damages under s.13 of the Act. This is to the effect that Mr Quinton did not suffer any damage as a result of any contravention. The argument is developed that, even if all his complaints were sound, none of the damage he suffered resulted from the use of electronic machines or processes. The impact upon him would have been the same if the leaflet had been drafted by quill pen and ink. Mr Warby addresses this submission by the argument that one cannot escape liability (assuming damage was caused by the publication of the leaflet) by the argument that one *might* have used another method of processing and production which would have escaped the embrace of the Data Protection Act. What matters is that the leaflet was composed and processed, in fact, by electronic means.

74. By way of amendment during the trial, Mr Speaight introduced a plea based on s.13(3) of the Act (only relevant to the claim for statutory compensation) to the effect that his clients had taken reasonable care. This obviously only arises in circumstances where the court has found there to be inaccuracy and would, but for the reasonable care, be contemplating an award.

75. An overriding argument of Mr Speaight is that the data protection legislation should not be interpreted so as to interfere with the freedom of a political process, especially in the context of electioneering. It is to be supposed that if Parliament intended to impose a whole new raft of restrictions in that context, it would have done so expressly.

76. It is said that the court should adopt the interpretative process of s.3 of the Human Rights Act 1998 and "read down" provisions of the Data Protection Act so as to avoid liability on the part of defendants such as these. He suggests that to apply the provisions in the way sought by Mr Quinton would be to impose an unnecessary and disproportionate fetter upon the exercise of the Defendants' Article 10 rights. There is a supplementary argument placing reliance upon the EU Directive 95/46/EC which, by Article 1, provides that:

> "Member states shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to processing of personal data."

It would seem to be important, as so often when addressing rights of privacy, to set alongside and balance against them competing rights of other relevant persons under Article 10.

My conclusions

77. In the light of these submissions, I am now in a position to state my conclusions.

78. The Beech Lane section of the leaflet was doing little more than commenting adversely on the fact that Mr Quinton did not make it to the meeting in time. Of course, the notion of "failure" is derogatory and involves criticism, but although partial, it cannot be said in my judgment to have been false or inaccurate. There was "mitigation" available to Mr Quinton in that he intended to come to the meeting and that he was late for reasons which he says were beyond his control. It was not, however, to be expected that a political opponent should make those excuses for him. In any event, Mr Peirce does not accept that matters were beyond his control. It was simply that he chose his priorities and took a risk.

79. As to the Goring meeting, the undisputed fact is that Mr Quinton made no contribution to the appeal hearing either in writing or orally. He had his own reasons for not doing so, which may have been perfectly valid, but that does not mean that Mr Peirce should be precluded from taking advantage of that basic fact and using it for electoral purposes. In the end, therefore, I am unable to conclude that the passage was factually inaccurate.

80. Finally, on the allegation of "encouragement" for significant development, I regard this not as a statement about Mr Quinton's wishes or policy towards development in Woodcote, but rather as a comment or inference about the prominence he chose to give in the Correspondent to the SODC press release. I quite understand that he thought it his duty to keep the electorate informed about council decisions and activities. Nonetheless, Mr Peirce and others were entitled to criticise his summary as giving unnecessary encouragement to landowners to put forward land for development. There is room for disagreement about this. It is a matter of opinion. Another witness, Ms Ruth Hubbard, was strongly of a different view, which she expressed in the July issue of the Correspondent. She did not think Mr Quinton was encouraging development and believed that his coverage was balanced.

81. Mr Peirce was entitled to cite the Correspondent piece (admittedly on a selective basis) in order to illustrate why he thought it not to have been in the best interests of Woodcote. He was not in my judgment, in expressing that opinion, significantly misrepresenting the essential fact (i.e. the degree of prominence given to the press release).

82. Nor do I believe that Mr Peirce was malicious. He does not appear to like Mr Quinton personally or to hold him in high regard. It is conceivable that he still resents the fact that he ousted him in 2003 from the seat he had occupied on the District Council for some 19 years. But I am not in a position to make a finding about it. I do not need to do so. What matters is that dislike is not to be equated with malice. Nor was he dishonest in his representations in the leaflet. He was partial, biased and hard-hitting. There is no doubt that some local electors disapproved of his methods, referring in one instance to "gutter politics" and in another to "shameful electioneering". Those are views which are perhaps understandable. It may be, as even Mr Cooper thought, that he was unduly negative and personal in his remarks, but I must take care not to equate that with malice either.

83. I should be guided by the exposition of Lord Diplock in *Horrocks v Lowe* [1975] AC 135, 150-151 and the emphatic distinction he there drew between malice and other states of mind such as, for example, being irrational or pig-headed. I am not suggesting that Mr Peirce's state of mind could be so characterised, but I merely take note of those well known passages so as to remind myself how high the hurdle of establishing malice really is. It is well recognised that the concept is to be interpreted similarly for purposes of injurious falsehood: see e.g. *Spring v Guardian Assurance* [1993] 2 All ER 273.

84. There is no way that Mr Cooper can be characterised as malicious. He had no reason to believe that the facts were inaccurate. He simply trusted Mr Peirce to be reflecting them accurately. Moreover, he did not approve of the negative whingeing tone and made some attempt (over the weekend) to have it diluted. He had some responsibility for the publication, as a matter of law, but it has not been demonstrated that his role was in any way infected by malice.

85. I thus reject the case based on this tort. I will consider, however, the other outstanding questions. Were the words calculated to cause Mr Quinton pecuniary loss? This is not entirely easy, but on balance I conclude that they were. It is, I recognise, highly technical. Nevertheless, I do think that (judged at the time of publication) the words published were likely to put in jeopardy his council allowances. He may well have found himself, if elected, out of pocket for the reason that his expenses outweighed the allowance, but that would be to take the analysis too far and, what is more, on a completely speculative basis.

86. When I turn to the question of actual financial loss, I conclude that Mr Quinton has not discharged the burden of proving causation. The leaflet may well have played a significant part in swinging the election Mr Peirce's way, but there were also other factors at work such as, for example, what appears to have been a high turnout of Liberal Democrat supporters in the ward. I cannot say that overall I am persuaded that it was the leaflet which caused Mr Quinton to lose his seat. Nor can I be satisfied to the required extent that he would, if elected, have been appointed a committee chairman, so as to qualify for the additional allowance. Evidence could have been introduced in support of that claim, but it was not.

87. I must now turn to the Data Protection Act. I am by no means persuaded that it is necessary or proportionate to interpret the scope of this statute so as to afford a set of parallel remedies when damaging information has been published about someone, but which is neither defamatory nor malicious. Nothing was cited to support such a far ranging proposition, whether from debate in the legislature or from subsequent judicial dicta.

88. Still less am I persuaded that it is necessary or proportionate so to interpret it as to give a power to the court to order someone to publish a correction or apology when the person concerned does not believe he has published anything untrue. Such a scheme could surely only work in respect of factual statements which could be demonstrated uncontroversially and objectively to be false. It cannot be intended to compel publication of an account of a factual scenario which is capable of being understood in different ways if, on one interpretation, it might not be accurate.

89. Parliament rejected such a draconian step when addressing the remedies to be made available under the summary judgment regime contained in ss.8–10 of the Defamation Act 1996. The Act stops short of that. Where the parties are unable to agree the steps to be taken, a judge can order the defendant, at most, to publish a summary of the court's ruling: s.9(2). He or she cannot be compelled to adopt or endorse it.

90. The legislature declined to provide for a power to require editors to publish corrections or factual accounts which they do not accept as accurate. This was for the same reasons as are contained in the reports of the Committee on Privacy and Related Matters (the Calcutt Committee, 1990 Cm. 1102) at para. 11.4 and the Supreme Court Procedure Committee on Practice and Procedure in Defamation (the Neill Committee, 1991) at XVII 3–4. It would be surprising if only about two years later the legislators were prepared to provide for compulsion in such circumstances without that being unequivocally made clear.

91. Mr Warby's argument is founded upon s.14, which provides for an order to "rectify, block, erase or destroy" inaccurate data. Indeed, any data "which contain an expression of opinion which appears to the court to be based on the inaccurate data" can also be made the subject of such an order. These remedies appear to be available independently of any claim for compensation: see e.g. *Sofola v Lloyds TSB Bank* [2005] EWHC 1335 (QB) at [47].

92. As to the substance of the matter, I am prepared to proceed on the assumptions that the offending material was personal data and that both Defendants were data controllers. But I would not accept (assuming the statute to apply to the leaflet) that there has been an infringement of either of the principles requiring accuracy and fairness. As to the former, I see no reason to apply different criteria or standards in this respect from those I have applied when addressing the tort of injurious falsehood. It follows that I do not need to address the "reasonable care" defence under s.13(3).

93. One suggestion was that, in order to comply with the obligation to be fair, Mr Peirce should not have "processed" this information without notifying Mr Quinton in advance. This proposition was based on Part 2 of Schedule 1 to the Act, paragraphs 2 and 3, which contain a "fair processing code". I decline, however, to interpret the statute in a way which results in absurdity. Plainly, it cannot have been the intention of the legislature to require electoral candidates to give their opponents advance warning each time reference is to be made to them in a document that happens to be computer generated. Yet that would appear to be the consequence of Mr Warby's argument.

94. In the event, for the reasons I have already given, I do not make any finding of substantial inaccuracy or of unfairness. I am fortunate, therefore, not to have to grapple with the possible statutory meaning of rectification. I should have been at a loss to know how I could possibly order Mr Peirce to publish Mr Quinton's version of events baldly and without explanation or comment.

95. Accordingly, I reject both claims and the action is dismissed.